No. 15649.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

Appeal From the United States District Court for the District of Nevada.

APPELLANT'S BRIEF.

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Jurisdiction.

Jurisdiction of the District Court in this case is based on diversity of citizenship (28 U. S. C. A. 1332). It was alleged in the Complaint [R. 3] that plaintiff was a citizen of the State of Nevada and defendant was a Utah corporation.

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U. S. C. A. 1291), and the timely invocation, by Appellant, of the prescribed procedure [Rule 73, Fed. Rules Civ. Proc.; R. 94-98].

Statement of the Case.

On July 12, 1949, Appellant was a railroad trainman employed by Appellee in Las Vegas, Nevada. On July 16, 1949, he was notified to report for a hearing the following morning at ten o'clock at the office of the Assistant Superintendent in Las Vegas for investigation and hearing on charges that he failed to protect his assignment as a swing brakeman at Nipton, California, on June 12, 1949, when he returned from Nipton to Las Vegas without authority to eat, in violation of certain operating rules [R. 13].

He appeared and requested a postponement so that he could have his representative, the local chairman of his brotherhood [R. 7] present [R. 14]. A postponement until 9:30 the following morning was granted [R. 14]. He then requested a further postponement on the ground that his representative was still not available, and was advised by the Chief Clerk to the Assistant Superintendent that the hearing would be deferred until 2:30 that day, and to get another representative [R. 16].

Appellant did not appear at 2:30 and a hearing was conducted in his absence by the Assistant Superintendent and the trainmaster [R. 12-29]. As a result of the hearing, he was discharged by the defendant [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the defendant refused reinstatement on such basis [R. 29-37].

Subsequently, Appellant's brotherhood submitted a claim in his behalf for similar relief to the National Railroad

Adjustment Board [R. 5-41], and after defendant had made its submission to the board, the brotherhood submitted a rebuttal thereto [R. 42-56]. On June 25, 1952, the board denied the claim, and although the brotherhood had argued in its submission and rebuttal that Appellant broke no rules in returning from Nipton to Las Vegas for food, and that under the collective bargaining agreement the Appellee had no right to have Appellant tied up at Nipton without eating facilities [R. 9-10, 42-45], the board made no findings or comment with respect to the matter [R. 56-59].

On June 6, 1955, Appellant filed a Complaint in the District Court, alleging that he was wrongfully dismissed as a trainman by Appellee in violation of the provisions of a collective bargaining agreement, and prayed for money damages [R. 35]. Appellee denied the allegations of the Complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. Appellee moved for summary judgment, which motion was denied after argument. Thereafter, Appellee moved for leave to move for summary judgment and for summary judgment [R. 85-90]. After argument thereon, the District Court granted Appellee's motion [R. 94].

Specification of Errors.

1. The Court below erred in holding that the denial of Appellant's claim by the National Railroad Adjustment Board entitled the Appellee to summary judgment.

Summary of Argument.

The Supreme Court of the United States has held that there is nothing in the Railway Labor Act which takes away from the courts jurisdiction to determine a controversy over the wrongful discharge of a railroad employee in violation of the provisions of a collective bargaining agreement. *Moore v. Illinois Central R.R.,* 312 U. S. 630. However, some courts have nevertheless held that by reason of Section 3 First (m) of the Act (45 U. S. C. A. 153), which provides that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to a dispute except insofar as they shall contain a money award," if the board determines a wrongful discharge case on the merits, adverse to the employee, he cannot sue in court for damages for such discharge.

The Supreme Court has not definitely ruled on the issue, having expressly reserved the same on two occasions. *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 718; *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239, 244.

In *Washington Terminal Co. v. Boswell,* 124 F. 2d 235, the leading case on the subject, and in which a carrier sought declaratory relief after an adverse board ruling, the majority implied that if an award by the board against a discharged employee was held to be final, Section 3 First (m) might be invalid. The dissent held, after reviewing the legislative history of the Act, and examining the implications of a construction of finality, that

Congress did not intend an award of the board to preclude subsequent resort to the courts, and that if it had such effect it would result in the taking of contract rights without due process of law. The *Washington Terminal* case was affirmed by an equally divided Supreme Court. 319 U. S. 732.

However, even if we assumed that the section should be construed so as to accord "finality" to a board determination that an employee was not discharged contrary to the provisions of the collective agreement, "finality" does not accrue unless there is a board determination on the merits.

In Appellants' case, the merits of the controversy were whether or not he was justified in returning from Nipton to Las Vegas for the purpose of eating, he having been tied up at Nipton where there were no eating facilities, in direct violation of the specific terms of Article 32 of the collective agreement. As the board made no determination whatsoever on this issue, or for that matter on any of the other issues with respect to contract violation by the Appellee, although they were specifically raised, the award of the board is not entitled to "finality" and under *Moore v. Illinois R.R., supra,* Appellant could treat his discharge as final and sue for damages for wrongful discharge.

ARGUMENT.

I.

A Determination by the National Railroad Adjustment Board That a Railroad Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement Does Not Preclude the Employee From Suing in Court for Damages for Wrongful Discharge.

In *Moore v. Illinois Central R.R.* (1941), 312 U. S. 630, 634, 85 L. Ed. 1089, the carrier contended that the plaintiff employee could not bring an action for wrongful discharge in a state court until he had first presented his case to the National Railroad Adjustment Board, established under the Railway Labor Act (45 U. S. C. A. 153). In striking down this contention, the Supreme Court said:

> ". . . we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . ."

Despite the clear language of the *Moore* decision, lower courts have held that if a discharged railroad employee submits his claim to the board on merit, and the board makes a determination adverse to him, there is an election of remedies, and he is barred from bringing an independent court action, *i.e., Kelly v. N. C. & St. Louis Ry. Co.,* 75 Fed. Supp. 737; *Michel v. Louisville & N. R. Co.* (C. A. 5), 188 F. 2d 224. The decisions of these lower courts are based upon Section 3 First (m) of the Railway Labor Act (45 U. S. C. A. 153), which provides that the awards of the boards "shall be final and binding upon both parties to a dispute, except insofar as they shall contain a money award."

The United States Supreme Court has not had occasion to flatly rule with respect to the effect of the "finality" provision in a wrongful discharge case which has been determined by the board. In *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718, 89 L. Ed. 1886, the Supreme Court said:

> "The validity and conclusive effect of the award were challenged also upon other grounds, among them . . . that since the award denied a claim for money damages, it was within the exception of Section 3 First (m), which provides that 'the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award,' and therefore did not preclude this suit; and that the Act, if construed to make the award conclusive, would violate the Fifth Amendment's due process provision by denying judicial review to defeated employees, although allowing it to defeated employers. Cf. § 3 First (p), (q); Washington Terminal Co. v. Boswell, 75 App. D.C. 1, 124 F. (2d) 235, affirmed by an equally divided Court, 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430."

> ". . . the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed. Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. . . ."

As the Court remanded the case for further proceedings to determine whether or not the employees authorized the submission of their claim to the board, it deemed it unnecessary to construe Section 3 First (m). And in

Slocum v. Delaware, L. & W. R. Co. (1950), 339 U. S. 239, 244, 94 L. Ed. 795, the Supreme Court took pains to reserve the question presented by the instant case:

> ". . . Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction."

Washington Terminal Co. v. Boswell (App. D. C., 1941), 124 F. 2d 235, affirmed by an equally divided Supreme Court 319 U. S. 732, 87 L. Ed. 1694, and cited by the Supreme Court in *Elgin, Joliet & Eastern R. Co. v. Burley, supra,* is undoubtedly the leading case on the finality provision. The majority decision was written by the late Justice Rutledge, who later wrote the opinion in the *Elgin* case.

In the *Washington Terminal* case, employees had submitted their claim to the board and the carrier appeared and made a full submission on the merits. The board made an award in favor of the employees, who were members of two unions, holding that under their collective bargaining agreement they were entitled to do the work previously done by others. The board ordered the carrier to make the award effective within thirty days. The carrier did not comply, and thereafter filed suit for declaratory relief, seeking adjudication of its rights under the agreement, including whether the agreement, if rightly interpreted, gave the employees the right to do the work in dispute. The carrier also sought an adjudication that the award and order were void.

In a two to one decision, the majority held that declaratory relief did not lie and the method of review set forth in the act, namely an enforcement suit by the em-

ployees (45 U. S. C. A. 153, First (p))* was the exclusive method of review.

The carrier had claimed a denial of constitutional rights, because the administrative proceeding did not comply with due process requirements. In answering this contention, the majority said that this would be important if the board's decision was final in the legal sense. However, as the decisions were not final, but the findings and order merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo,* the argument that the administrative proceedings were wanting in due process was cured by the full and complete opportunity given to the carrier in an enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution.

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*45 U. S. C. A. 153 First (p) provides as follows:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

The carrier further contended that the act balanced the scales of justice unevenly by permitting employees to sue and not giving carriers the same right. In answering this contention, Justice Rutledge clearly recognized that if the "finality" provision was applied literally to a case in which an award was unfavorable to an employee, it might be invalid. At pages 245 and 246, he said:

> "If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might thereafter have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

The dissent, written by Justice Stephens, held that the enforcement suit provided by the Act was not exclusive. He said (p. 273) that if it were held to be exclusive, one of the consequences would be that

> ". . . Congress intended to give the Board in effect final power to determine contract obligations—since the disputes which it is to consider are of a legal nature 'growing out of the interpretation or the application of agreements' (Section 2) notwithstanding the fact that the Board is concededly an adjustment board rather than one to adjudicate legal rights and obligations, and notwithstanding that if the Board, rather than giving effect to the actual legal obligations of a contract, should disregard them, the award would in effect abolish actual obligations and substitute new ones, thus reducing collective bargaining agreements to virtual nullity. . . ."

Justice Stephens, on pages 274-276, pointed out that there was nothing in the legislative history of the 1934 act indicating an intent to make the act's procedure exclusive. The provisions with respect to statutory suit and "finality" were not in the 1926 Act, and there was nothing in the legislative history of the 1934 Act, in which act the statutory suit and "finality" came into being, indicating that the remedy under the act was to be exclusive. Justice Stephens said, on page 276:

> "And yet if that section forbids access to the courts in other forms of action, the 1934 Act represents a serious change over the 1926 Act. It would seem likely that, if it had been the intention of Congress to accomplish such a change, they would have said so."

On page 269, Justice Stephens said, with respect to Congressional intention on the "finality" provision, that:

> "It would seem more logical to conclude that it could hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board . . ."

Justice Stephens, in his opinion (p. 276), pointed out that if resort to the Courts by the carrier was precluded, under the Act, it would result in contract rights being taken without due process of law. The same result would obviously apply in the case of an employee barred from the courts:

> "It is a settled rule of statutory construction that courts will if possible avoid such an interpretation of a statute as will raise serious doubts as to its constitutionality. I think the construction which the appellees put upon the Railway Labor Act would threaten its validity. For the position of the appellees can hardly be limited to declaratory relief. The argument is that Congress has made the adjustment procedure and statutory enforcement proceeding, in the event of an award, exclusive. The consequence must then be that there is no access to the courts whatever either for damages or by way of injunction or for declaratory relief. The last is but remedial. Declaratory judgment statutes add nothing to the substantive jurisdiction of the Federal courts. Aetna Life Ins. Co. v. Haworth and Aetna Casualty & Surety Co. v. Quarles, both cited supra. There is of course no constitutional right to a declaratory judgment as such, but if the Labor Act is construed to bar all judicial relief to the carrier party to a collective bargaining agreement this would deny the carrier

> due process of law, since deprivation of remedy in the courts would destroy the character of collective bargaining agreements as contracts for the carrier. For the reasons stated in topic IV (1), the remedy afforded the carrier by way of defense to the enforcement proceeding available to employees only under Section 3(p) is in effect no protection. 'Without the remedy'—mainly an adequate remedy—'the contract may, indeed, in the sense of the law, be said not to exist, and its obligation not to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are 'inseparable' Von Hoffman v. Quincy, 1866, 4 Wall. 535, 552, 18 L. Ed. 403. Therefore a contract will have been taken without due process of law."

The Appellant has dwelt on the *Washington Terminal* case at length, because both majority and minority opinions are obviously well reasoned, their *dicta* persuasive and represent considerable effort on the part of their authors. Of equal importance is the fact that the case was affirmed by the Supreme Court by a four to four vote, Justice Rutledge not voting, and therefore represents a holding by that Court on the "finality" issue. Thus, in effect, as many as four members of the Supreme Court, who voted for affirmance, may have agreed with Justice Rutledge that where the board denied relief to an employee, and such denial was held to preclude resort to the courts, it might be unconstitutional. The four members of the Supreme Court who did not vote to affirm, clearly must have agreed with Judge Stephens that Congress did not intend to exclude an employee from recourse to the courts even though he lost before the board.

In *Dahlberg v. Pittsburg & L. E. R.* (1943), 138 F. 2d 121, the question of the finality of an award was presented to the Third Circuit. Employees there brought an action in the district court to enforce an order of the board which, by the board's interpretation of the contract between the carrier and the employees, gave seniority rights to the employees. The carrier urged that the construction of the contract by the board was clearly wrong and the court should refuse to enter an order of enforcement, while the employees contended that the board order was final and binding on the parties and the court was not authorized to review it. In affirming a dismissal of the employees' complaint, the court, at page 122, said:

> "In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

And on page 123, the Court continued as follows:

"If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in Washington Terminal Co. v. Boswell, 75 U. S. App. D. C.; 124 F. 2d 235, 276, 'There can be no valid delegation of governmental power to non-governmental agencies.' Carter v. Carter Coal Co., 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160. The Adjustment Board, consisting of bi-partisan group paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

"If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act's constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no court review of the merits. This point was dealt with by Justice Rutledge in the Washington Terminal Co. v. Boswell, supra, as follows: 'Much of the argument has been bult around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.'

> "The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes. Under both the act of May 20, 1926, 45 U. S. C. A. §§151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the board had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 makes the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable decisions."

The appellant submits that Section 3 First (m) of the Railway Labor Act should not be construed to prevent an employee, whose claim has been denied by the board, from bringing a court action for damages for such wrongful discharge. As the Supreme Court said in *Moore v. Illinois Central R.R., supra,* there is "nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge."

II.

Assuming Arguendo That Section 3 First (m) of the Railway Labor Act Should Be Construed so as to Accord "Finality" to a Determination That an Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement, the National Railroad Adjustment Board Has Made No Such Determination.

Attached to the submission of Appellant's union before the board, as "Employees Exhibit A" is the so-called transcript of the "investigation" of the charge against Appellant held by Appellee's assistant superintendent and trainmaster in Las Vegas on July 18, 1949 [R. 12-29]. It is obviously not a verbatim transcript, but apparently a re-write of what occurred by the chief clerk to the assistant superintendent. It does not even purport to be a verbatim transcript, but rather a series of questions and answers prepared for the signatures of the witnesses.

Article 33 of the collective bargaining agreement* pertinently provides that ". . . no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present" [R. 7]. The "investigation" and hearing was to be conducted in conformity with Article 33 [R. 13]. And despite this contractual requirement for a "thorough investigation," all witnesses were advised, according to the transcript, that they had been called as witnesses for the appellee [R. 16-17, 19, 24, 26], and the transcript recites that Mr. Groome, the Assistant Superintendent, said:

> "As Brakeman Price, with his representative, did not appear at this investigation as directed there is

*Designated by Appellee for printing [R. 99], but apparently not deemed necessary to be printed because of its length.

no one present to present evidence or witnesses on his behalf. The investigation is closed. . . ."

Is an investigation "thorough" if the person conducting it elicits evidence only to sustain charges preferred by his employer against an employee? *Cf., Hicks v. Hiatt,* 64 Fed. Supp. 238, 243, in which Judge Biggs held that an investigation was not "thorough" where the investigating officer paid little attention to evidence available to him.

The notice of investigation to Appellant stated: "You may produce such witnesses as you may desire, at your expense" [R. 13], although Article 25 of the collective bargaining agreement provided that trainmen "attending court or other business of the company" would be paid. Apparently it was felt that Appellant's witnesses would not be testifying in behalf of the Appellee and their presence would not be necessary in order to have a "thorough" investigation.

Is an investigation "thorough" if the only witnesses who testify in support of the charges being investigated are to be paid for their attendance? Is it any wonder that Appellant's brotherhood, in seeking his reinstatement, compared the hearing to a "Kangaroo Court?" [R. 31.] Manifestly then, the investigation held was not a "thorough" one.

However, let us proceed to examine the transcript to see what was being purportedly investigated. *The heart of the matter was whether or not Appellant did wrong in returning from Nipton to Las Vegas, to eat.* With the exception of statements by S. M. Smith, the assistant clerk, who made the transcript, with respect to his conversations with Appellant concerning his requests for post-

ponement [R. 16-17, 23-24], the statements of all other witnesses [Rose, R. 17-19; Dixon, R. 19-21, 23; Wilde, R. 26, and Grundy, R. 26-28], dealt solely with Appellant's return from Nipton to Las Vegas for the purpose of eating.

Dixon stated that Appellant was called to deadhead on a 9:15 P. M. train to Nipton for swing service (extra brakeman) [R. 20]. Rose, the train dispatcher in Las Vegas, stated that the train arrived at Nipton at 10:25 P. M. and that Appellant called him after arriving in Nipton, and the witness told him to protect a train which would arrive at Nipton about 4:00 A.M. He further stated that Appellant "said there was no place to eat or sleep at Nipton, and that he was returning on the first eastbound train" [R. 17-18].

Wilde, another Las Vegas train dispatcher, who apparently relieved Rose, stated that shortly after midnight, Appellant called him on the telephone and said: "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and Wilde told him definitely not. Wilde further stated that Appellant was not "arbitrary" with him [R. 24-25].

The submission by Appellant's brotherhood raised two issues. They were (1) that the Appellee ignored Article 33 of the collective bargaining agreement by holding the hearing when it knew Appellant's representative was not available and requiring him to pay his own witnesses, and (2) that Appellant was justified in leaving Nipton for food because Article 32(b) of the collective agreement provided as follows:

> "Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available." [R. 7-9.]

The Appellee thereafter submitted to the board its response to the submission filed in behalf of Appellant [R. 71]. That response was not part of the record in the Court below. A rebuttal to the response was thereafter filed by the brotherhood [R. 42-56]. The Appellee's response was obviously of some length as the rebuttal refers to matters contained on page 21 of the response [R. 42]. It is a reasonable inference from a reading of the rebuttal that the response dealt primarily with the contention of the brotherhood that under the collective agreement the Appellee had no right to tie up Appellant at Nipton where there were no eating and sleeping facilities, for almost all of the rebuttal deals with this issue and answers points raised in the response with respect thereto.

In this regard, it is noteworthy that the Appellee in its response stated "There were, of course, adequate eating and sleeping accommodations at Nipton . . ." [R. 45] and the rebuttal submitted a notarized notice dated July 2, 1949, addressed to Appellant's brotherhood advising there would be no meals served at the Nipton Hotel between 8:00 P. M. and 6:00 A. M. daily until an agreement was reached providing a certain minimum revenue from rooms [R. 45-46].

Whether or not Appellee violated the collective agreement by detraining swing brakemen at Nipton where there were no eating and sleeping facilities was not only the crux of the controversy between Appellant and Appellee, but this apparently was a matter of controversy between the brotherhood and Appellee, and as a result the brotherhood had taken the matter to the National Mediation Board [R. 55], and on July 15, 1949,

a mediation agreement was entered into by the terms of which swing brakemen would not be detrained at Nipton [R. 38-41, 43, 45].

As pointed out above, the heart of the matter to be investigated by the assistant superintendent and trainmaster was whether or not Appellant did wrong in returning from Nipton to Las Vegas to eat. A determination of this question would undoubtedly be a determination on the merits. This very question was raised in the brotherhood's submission, responded to by the Appellee at apparent length, and such response vigorously rebutted by the brotherhood's rebuttal.

Let us examine to see what the board did with respect to this vital issue, the issue that was on the merits. The board, in its findings, said as follows:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of the agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.
>
> "Basically, the complaint is that the hearing was held when the claimant was not present." [R. 57.]

Although the remainder of the board's findings are completely illogical and unpersuasive, ignoring completely the contentions that the investigation was not "thorough," that Appellant's representative was not available as required by the collective agreement, and Appellant should

not, under the agreement, have been required to pay for the attendance of his witnesses, the above-quoted findings with respect to the merits are truly fantastic.

In *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, 243, 94 L. Ed. 795, the Supreme Court spoke of the board and its functions as follows:

> ". . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the boards initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nations railway system."

The expertise attributed by the Supreme Court to the board in the *Slocum* decision was patently absent in its award and findings in Appellant's case. None of the provisions of the collective bargaining agreement upon which Appellant's brotherhood relied was even referred to by indirection. The merits of the controversy were not even considered.

Assuming Section 3 First (m) of the Act is entitled to the construction Appellee's will undoubtedly claim, can an award of this nature be deemed "final and binding" and result in the loss of valuable contract rights? Should such an award be held to deprive Appellant of his day in Court on the issue of whether or not, in the light of

Article 32 of the collective agreement, he was justified in returning from Nipton to Las Vegas to eat? Should such an award be held to deprive him of a determination of such a vital contract issue? Even courts which hold that an award unfavorable to an employee is final concede that the employee is entitled to a determination on the merits.

Koelker v. Baltimore and Ohio Railroad Company (1956), 140 Fed. Supp. 887, 889 (D. C. E. D., Pa.), was an action against a carrier for salary lost by an employee as a result of being laid off allegedly without good cause. Employee had submitted her case to the board, which denied the claim. The court said that if the award of the board was on the merits, its decision was final. The carrier had raised two defenses before the board. The first was that the employee was not represented by her brotherhood and therefore the board had no jurisdiction. The second was that the railroad's actions were justified in that there was evidence that plaintiff was emotionally unstable and she manifested an abnormal personality which would result in continuing conflict with fellow employees. The Court said the second defense before the board was on the merits. The award of the board pertinently provided as follows:

> " 'Opinion of Board: The evidence of record reveals that there is no dispute between the parties to the controlling Agreement.
>
> " 'Findings: The Third Division of the Adjustment Board, upon the whole record, and all the eivdence, finds and holds:
>
> " 'That both parties to this dispute waived oral hearing thereon;
>
> " 'That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes

within the meaning of the Railway Labor Act, as approved June 21, 1934;

" 'That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

" 'That Carrier's action in this case will not be disturbed.

" 'Award

" 'Claim denied in accordance with Opinion and Findings.' "

The Court said that it found it impossible to tell from the record whether or not the award was a decision on the merits, and as the board had exclusive primary jurisdiction because it involved a grievance under a labor agreement (*Slocum v. Delaware, L. & W. R. Co., supra*), he deferred a ruling on the carrier's motions to dismiss and for summary judgment for a sufficient time to permit plaintiff to obtain an award on the merits.

The *Koelker* case was not a wrongful discharge case as is the instant case, and under the *Moore v. Illinois, supra,* decision, Appellant could treat the Appellee's action discharging him as final, and sue in court for breach of contract. In *Slocum,* the Supreme Court, page 244, said:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Cent. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs

from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

In *Michel v. Louisville & N. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 225, 227, one of the cases cited below by Appellee, the plaintiff brought an action for wrongful discharge against a carrier, claiming the discharge constituted a violation of the collective agreement. The Court, on pages 224 and 225, said:

"The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

As the board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

"It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

In *Kelly v. N. C. & St. Louis Ry.* (E. D. Tenn., 1948), 75 Fed. Supp. 737, a discharged locomotive engineer sued for wrongful discharge. The defendant railroad moved for summary judgment on the ground that the plaintiff had voluntarily carried his claim before the Railroad Adjustment Board to final hearing and the board had the matter under advisement. In granting the motion for summary judgment, the Court stated:

> "This adjudication is made with the understanding that the plaintiff has a petition and record before the Adjustment Board to which the defendant has appeared and made defense, all to the end that the Adjustment Board has taken jurisdiction to and will, determine the grievance upon its merits. The plaintiff must have a hearing on the merits, either before the Board or in this court . . ."

Thus, even assuming finality should be attributed to a board award determining the merits of a discharge claimed to be in violation of a collective bargaining agreement, and Appellant urges that such an award cannot legally be so dignified, Appellant has had no such determination and was entitled to seek relief in the court below. *Cf., Union Pacific R. Co. v. Olive* (C. A., 9, 1946), 156 F. 2d 737.

Conclusion.

For the reasons stated herein, the Appellant respectfully prays that the order granting summary judgment be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellant.